

STATE OF CALIFORNIA
ELECTRICITY OVERSIGHT BOARD



Gray Davis, Governor

May 25, 2001

VIA ELECTRONIC TRANSMISSION

Hon. David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

**Re: California Independent System Operator Corporation,
Docket Nos. EL00-95-030 and EL00-98-029**

Dear Secretary Boergers:

Attached for filing in the above-captioned dockets is the California Electricity Oversight Board's Motion to Intervene and Comments.

Thank you for your assistance.

Sincerely,

M. Catherine George
Senior Staff Counsel

Enclosures

cc: Official Service List of EL00-95-030 and EL00-98-029

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System)	Docket Nos. EL00-95-030
Operator Corporation)	and EL00-98-029

**MOTION TO INTERVENE AND COMMENTS OF
THE CALIFORNIA ELECTRICITY
OVERSIGHT BOARD**

Pursuant to the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 C.F.R. § 385.214(a) and (b) and the Commission's Notice of Filing dated May 10, 2001, the California Electricity Oversight Board (Oversight Board) hereby moves to intervene and submits comments in the above-captioned dockets.

I. COMMUNICATIONS AND CORRESPONDENCE

The principal office of the Oversight Board is located at 770 L Street, Suite 1250, Sacramento, California, 95814. All pleadings, orders, correspondence and communications regarding this motion should be directed to the following persons:

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II. BASIS FOR INTERVENTION

Pursuant to the Commission's Notice of Filing dated May 10, 2001, the Oversight Board moves to intervene to obtain party status to represent itself, and the responsibilities the State of California has assigned to it, in the above-captioned proceeding. The

Oversight Board was created as a component of California's comprehensive restructuring legislation. Among the Oversight Board's statutory responsibilities are to oversee the California Independent System Operator Corporation (CAISO or Corporation),¹ to exercise a confirmation function concerning appointments to the CAISO governing board,² and to approve corporate bylaw amendments relating to the selection of CAISO governing board members.³

On April 26, 2001, the CAISO submitted Amended and Restated Bylaws (Amended Bylaws) for Commission acceptance. In advance of tendering the Amended Bylaws for filing, they were approved by the CAISO's board of governors and the Oversight Board, on April 12, 2001 and April 18, 2001, respectively. The CAISO requests an effective date of April 18, 2001. As the CAISO states in its filing, amendments to the CAISO's bylaws were necessary to bring the Corporation's bylaws into conformance with recent statutory changes required by Assembly Bill (AB) 5X, approved by Governor Davis and filed with the California Secretary of State on January 18, 2001. Among other things, and most significantly for purposes of anticipated challenges to the instant filing, AB 5X modifies the governance structure of the CAISO by (1) requiring that within 90 days of the bill's enactment the Governor of California appoint a five member independent governing board of directors to replace the then-existing stakeholder board and (2) establishing the qualification standard that board

¹ Cal. Pub. Util. Code § 335(a).

² The Oversight Board's role in this regard is to "exercise the exclusive right to decline to confirm the appointments of members of the governing board of the Independent System Operator." Cal. Pub. Util. Code § 335(b)(1).

³ Cal. Pub. Util. Code §339.

members be unaffiliated with actual or potential participants in the CAISO-administered markets.⁴

As a result of the Oversight Board's statutory responsibilities identified above, the Oversight Board has an interest that will be directly affected by the outcome of the above-captioned proceeding and its participation is in the public interest of the citizens of the State of California. The Oversight Board's interests are not and cannot be adequately represented by any other party.

For these reasons, the Oversight Board requests that the Commission grant this motion to intervene and afford the Oversight Board full rights as a party to this proceeding.

III. COMMENTS

The Oversight Board supports the CAISO's Amended Bylaws in their entirety and urges the Commission to accept them and make them effective as of April 18, 2001. In support thereof, the Oversight Board offers the following comments.

The CAISO's filing makes a number of changes to the Corporation's bylaws that are required by the terms of AB 5X, are made necessary for consistency internal to the bylaws, or were required by prior statutory amendment.⁵ As indicated above, however, it is the provisions in the Amended Bylaws that collectively establish the selection process

⁴ See, Cal. Pub. Util. Code § 337(a) and (b). Changes to conform with these provisions of AB 5X are reflected in the CAISO's Amended Bylaws at Article III, Sections 2 ("Number of Governors") and 4.1 ("Selection and Confirmation Procedures") and Section 4.2 ("Qualification of Governors").

⁵ Changes set forth in Article IX, §§ 3.1-3.2 of the bylaws to reflect provisions of Senate Bill 96, approved by Governor Davis and filed with the Secretary of State on September 27, 1999, were approved in concept by the Commission in *California Electricity Oversight Board*, 88 FERC ¶ 61,172, p. 61,577 (1999), reh'g denied, *California Electricity Oversight Board*, 89 FERC ¶ 61,124 (1999), *petition dismissed*, *Western Power Trading Forum, et al., v. FERC*, 245 F.3d 798 (D.C. Cir. 2001).

and qualification standards for governing board members that the Oversight Board anticipates will engender the most criticism.⁶

In Order 888,⁷ the Commission established that taking steps to qualify as “a properly constituted ISO is a means by which public utilities can comply with the Commission’s non-discriminatory transmission tariff requirements.”⁸ Accordingly, Order No. 888 provides guidance on principles that the Commission will use in evaluating proposals for independent system operators (ISOs). Among the principles articulated in Order 888 is that of independence, characterized by governance structured in a fair and non-discriminatory manner.⁹ With respect to an ISO’s governance, Order 888 requires that an ISO be independent of “any individual market participant or any one class of market participants.”¹⁰

Similarly, in Order 2000,¹¹ the Commission established independence as a minimum characteristic required to be satisfied in order for a transmission entity to

⁶ Indeed, precipitated by the CAISO’s March 22, 2001 filing of comments concerning market monitoring and mitigation containing analyses distasteful to them, several parties requested that the Commission reject filings made by the CAISO on the basis that the composition of the governing board, as constituted pursuant to AB 5X, violates the Federal Power Act and the Commission’s December 15, 2000 Order Directing Remedies for California Wholesale Electric Markets. The Oversight Board anticipates that many of the same arguments will be made in response to the instant filing. Indeed, Williams Energy Marketing and Trading Company, among those entities earlier challenging the CAISO’s authority to make filings before the Commission through its April 6, 2000 motion in EL00-95-012, already has filed a protest in this docket on similar grounds.

⁷ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities: Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996) (“Order 888”), on reh’g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), on reh’g, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 63,688 (1997), on reh’g, Order No. 888-C, 82 FERC ¶ 61,046 (1998); affirmed in relevant part, Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 684, *et seq.* (2000) cert. granted, ___ U.S. ___ (2001).

⁸ *Id.*, slip. op. p. 280.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Regional Transmission Organizations, Order No. 2000, 90 FERC ¶ 61,285 (2000), 65 Fed. Reg. 809 (2000), FERC Stats & Regs. ¶ 31,089 (1999), order on reh’g, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs., ¶ 31,092 (2000), petitions for review pending sub nom., Public

qualify as a Regional Transmission Organization (RTO).¹² As in Order 888, Order 2000's independence criterion is achieved through a governance structure that is independent of market participants and that has as its overall purpose ensuring that an RTO will provide transmission service and operate the grid in a non-discriminatory manner.¹³

The Commission's December 15, 2000 Order Directing Remedies for California Wholesale Electric Markets (December 15 Order)¹⁴ reflects the independence principles articulated in both Orders 888 and 2000 by requiring that CAISO's governing board "be replaced with a nonstakeholder Board, and that the members selected to serve on the new Board be independent of market participants."¹⁵ As is reflected in the CAISO's Amended Bylaws, AB 5X replaced the stakeholder board with a five member independent board appointed by the Governor. Further, it requires that members be unaffiliated with any actual or potential participant in the CAISO-administered markets.¹⁶ While resulting from a *process* different than that contemplated in the December 15 Order, the resulting CAISO governance structure – *a nonstakeholder board* that is *independent of market participants*-- is the same as envisioned in the December 15 Order.

Under Section 205 of the Federal Power Act,¹⁷ the Commission has the authority to ensure that rates, terms and conditions of transmission and sales for resale in interstate

Utility District No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, *et al.* (D.C. Cir) ("Order 2000").

¹² *Id.*, slip op. p.152.

¹³ *Id.*, slip op. p. 194. Order 2000 declines to impose a specific requirement for governance of an RTO other than requiring that a governing structure meet the general principle of having a decisionmaking process that is independent of any market participant or market participant class (*id.*, slip. op. p. 227). Likewise, the Commission refrained from imposing any requirement or prohibition on the role of state agencies in RTO governance (*id.*, slip. op. p. 230).

¹⁴ *San Diego Gas & Electric Company, et al.*, 93 FERC ¶ 61,294 (2000), reh'g pending.

¹⁵ December 15 Order, slip. op. p. 64

¹⁶ *See*, Cal. Pub. Util. Code § 337(a) and (b).

¹⁷ 16 U.S.C. § 824d.

commerce by public utilities are just, reasonable and not unduly discriminatory or preferential. Orders 888 and 2000 are intended to promote these objectives. By enacting AB 5X, California has not attempted to invade the province of the Commission by dictating any particular rate, term or condition of transmission service. By amending its bylaws to comply with state law, the CAISO likewise has not attempted to disregard any of the Commission's authorities under Section 205. Rather, the CAISO Bylaws and the state laws to which they conform relate solely to the manner of appointment, number, term and permissible affiliations of the Board of Governors of a California Corporation.¹⁸

While concurrently operated as a FERC-jurisdictional public utility, the CAISO is duly constituted as a California corporation, organized pursuant to the California's Nonprofit Public Benefit Corporation Law for the charitable purposes defined in relevant sections of the California Public Utilities Code.¹⁹ Corporations, including the non-profit, public benefit corporations such as the CAISO, are artificial creations, wholly dependent on state law for their existence. It is state law that defines corporate powers, rights and liabilities, prescribe their procedures and govern their continued existence.²⁰

The Commission's control over "independence" as articulated in Order 888 (and Order 2000) is not coterminous with control over corporate governance. Neither Order 888 nor the FPA authorize the Commission to dictate the governance of a corporation

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¹⁸ Cal. Pub. Util. Code § 337.

¹⁹ See, Cal. Pub. Util. Code, Chapter 2.3, Part 1, Division 1.

²⁰ See, e.g., *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127-128 (1937) ["How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. . . ."]

organized under state law, despite its concurrent operation as a public utility for purposes of the FPA. To the extent that the December 15 Order seeks to establish otherwise, it is incorrect.²¹

Indeed it is difficult to imagine the Commission crafting an order in which it seeks to, let alone succeeds in, disbanding or reconstituting the existing board of directors of Pacific Gas and Electric Company or Portland General Electric Company, for example, which owns and, like the CAISO, operates transmission facilities. Surely the Commission does not mean to suggest that its FPA authority reaches that far. While the Oversight Board does not attempt to address here all of the potential issues associated with assertions that may be made as to federal preemption of state corporate law, the Oversight Board disputes any contention that the Commission possesses the authority to alter the corporate structure of a duly constituted state law corporation.

The Oversight Board does not dispute that the Commission's authority over ISOs as articulated in Order 888 (and over RTOs as articulated in Order 2000) encompasses the ability to determine whether or not a proposed or existing ISO meets the various standards and requirements, including independence, that have been established for such entities. Were the Commission to find that a particular corporation fails to satisfy ISO criteria, however, the Commission might choose to rule that the ISO no longer qualifies as an ISO for purposes of Order 888. Under such circumstances, the Commission could reject the entity's tariff, necessitating a process for determining what process should flow from such a rejection.

²¹ This aspect of the December 15 Order is pending rehearing.

Likewise, if, notwithstanding that by its terms and functions the CAISO governance structure satisfies the independence criteria articulated in Orders 888, 2000 and the December 15 Order, the Commission believes that the CAISO has violated its orders by revising its bylaws to conform to state law, the proper remedy for the Commission is not to disband the CAISO's governing board or direct its reconstitution through revised bylaws. Rather, the Commission's remedy lies in an enforcement action in federal court under Section 314 of the Federal Power Act.

IV. CONCLUSION

Through Orders 888 and 2000, the Commission has established that the governing structure of an ISO or an RTO should be independent of any market participant or class of market participants. Neither of these Orders prohibits a state role in the selection of a governing board.²² When distilled to its essence, the December 15 Order is consistent with Orders 888 and Order 2000 in determining that the CAISO's governing structure should be composed of a board with members who are independent of market participants. In substance, the Amended Bylaws reflect these independence principles. That the CAISO's governance structure, which by its terms satisfies the Commission-established independence criteria, was achieved through a *process* different than that envisioned by the Commission in its December 15 Order does not change this result.

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²² Indeed, Order 2000 considered but declined to prohibit a role for state agencies or officials in RTO governance. *See slip. op.* pp. 230-232.

For the reasons set forth above, the Oversight Board respectfully requests that the Commission grant this motion to intervene and accept the CAISO's Amended Bylaws for filing making them effective April 18, 2001.

Dated: May 25, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary for this proceeding on May 25, 2001.

Dated at Sacramento, California, this 25th day of May, 2001

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